

Exhibit D

FROM : LAW

FAX NO. : 9789700434

Oct. 23 2006 01:08PM PS



ALLEN J. JARASITIS
JUSTICE

TRIAL COURT
CHARLESTOWN DISTRICT COURT
3 CITY SQUARE
CHARLESTOWN, MASSACHUSETTS 02129

October 18, 2006

William Lisano, Clerk Magistrate
Lowell District Court
41 Hurd Street
Lowell, MA 01852

Re: Commonwealth v. Mercado, 9411 CR 2750 & 9411 CR 2855

Dear Clerk Magistrate Lisano:

I enclose allowed motion for a new trial regarding the above-captioned matter. Please place this matter on the trial list and notify defendant's counsel and the District Attorney's Office of this decision.

Respectfully,

A handwritten signature in black ink, appearing to read "Allen J. Jarasitis".

Allen J. Jarasitis
Justice

cc: Daniel Murphy, Esquire

Enclosures

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

DISTRICT COURT DEPARTMENT
LOWELL DIVISIONNo.: 94 11 CR 2750 &
94 11 CR 2855

10/18/06
Allowed
[Signature]

COMMONWEALTH

v.

ELVING MERCADO

MOTION FOR A NEW TRIAL
&
MOTION FOR RECONSIDERATION OF
MOTION FOR A NEW TRIAL
(MOTIONS TO WITHDRAW GUILTY PLEAS)

Now comes the defendant, in the above-entitled action, and respectfully moves this Court to reconsider its ruling of January 29, 2003 and subsequent related rulings or to grant this new motion to allow him to withdraw his prior admissions and pleas to each count of the two above referenced Complaints, and that he be granted either a new trial pursuant to Rule 30 and Rule 12, of Mass.R.Crim.P., the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article XII and XIV of the Massachusetts Declaration of Rights, or that one or both of the above captioned complaints be dismissed, set aside, filed, or merged with the other, in the interests of serving justice.

In support of his motion the defendant avers that:

- (1) The guilty pleas in the above-entitled complaints were not entered knowingly and intelligently,
- (2) The two guilty pleas resulted from two drug cases occurring within several days of each other at a time when the defendant was seventeen (17) years old, and suffering from diagnosed mental illness, he had ceased treatment, and was addicted to heroin;

- (2) At the time that the pleas were entered in the above cases the defendant was suffering from mental illnesses that were not brought to the attention of the Court and which prevented him from making a truly voluntary and knowing plea;
- (3) Furthermore, the defendant didn't understand or appreciate that he was pleading guilty to *two* separate complaints, and instead thought he was resolving one case;
- (4) The defendant's pleas were invalidly entered under Rule 12 of the Massachusetts Rules of Criminal Procedure, as there was only *one* Waiver of Jury Trial filed in these two matters, without a docket number;
- (5) The defendant did not understand and appreciate the specific constitutional rights that he was relinquishing in regard to the above two complaints;
- (6) The defendant's trial counsel was ineffective in failing to investigate and address the mental illness issues, by failing to advise him of his specific constitutional rights and nature of the overall plea agreement; and/or
- (7) The charges in the complaints lodged by the Commonwealth are "fatally flawed" under the United States Supreme Court ruling of Apprendi v. New Jersey, 530 U.S. 466, 488-492 (2000) in conjunction with Blakely v. Washington, 542 U.S. 296 (2004), 111 Wash. App. 851 (2004), where neither the amount nor the quantity of the drugs were specifically outlined by the Commonwealth.

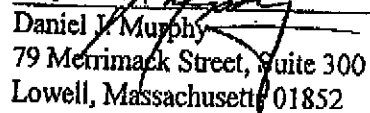
Newly contemplated medical (mental health) records, new affidavits, and recent case-law indicate that granting this motion would be necessary to serve the interests of justice under all of the circumstances.

The defendant's Motion is based upon the attached Memorandum of Law in Support of Motion for New Trial and the Appendix (with Exhibits A-C & Affidavits I-IV contained therein), filed concurrently herewith.

WHEREFORE, the defendant prays that this Honorable Court order that he be afforded a new trial, or other reasonable relief as requested herein, or as the Court deems just.

The forgoing is sworn to be true to the best of my knowledge information and belief:

Respectfully submitted,
ELVING MERCADO
By his Attorney,


Daniel J. Murphy
79 Merrimack Street, Suite 300
Lowell, Massachusetts 01852
BBO# 630726

REQUEST FOR HEARING ON MOTION

To: Middlesex County District Attorney's Office
151 Warren Street, Lowell, MA 01852

Please take Notice that the undersigned requests a hearing the within Motion for New Trial, before the Lowell District Court, holden at 41 Hurd Street, Lowell, Massachusetts, at some other reasonable location, date and time convenient to the Court and the Parties.

Dated: *October 14, 2006*


Daniel J. Murphy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the within Motion For New Trial has been served upon the Commonwealth, by delivering same by mail first class postage prepaid to:

Middlesex County District Attorney's Office
151 Warren Street, Lowell, MA 01852

Dated: *October 14, 2006*


Daniel J. Murphy